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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No._____

J. ALVAN DAVIS, TRUSTEE,
PETITIONER

VS.

B. F. AVERY & SONS COMPANY,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. Alvan Davis, as trustee of the estate of Alaga Tractor Company, bankrupt, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit reversing judgments of the District Court for the Middle District of Georgia and of the Referee, which sustained objections to the allowance of a proof of claim of B. F. Avery & Sons Company on the ground that the claimant had received a preference voidable under the Bankruptcy Act.

OPINIONS BELOW

The opinion of the Court of Appeals (R-142) is not yet reported. The opinion of the District Court (R-120) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 16, 1951. (R-149) Jurisdiction of this Court is invoked under Sec. 24c of the Bankruptcy Act (11 USCA Sec. 47) and under Sec. 1254 of 28 USCA.

QUESTIONS PRESENTED

1. Section 2a(2) of the Bankruptcy Act grants courts of bankruptcy jurisdiction to allow or disallow claims filed against bankrupt estates. Section 57g of the Act prohibits the allowance of claims of creditors who have received voidable preferences unless such preferences are surrendered to the trustee. The question is whether the Referee in Bankruptcy has summary jurisdiction to disallow a claim on objections by the trustee that the creditor had received a voidable preference, the creditor at the time of bankruptcy being in adverse possession of the transferred property under a claim of right; or, must the Referee postpone a hearing on the objections until the question concerning the preference can be determined in a plenary suit by the trustee to recover the preference.

2. If under such circumstances the Referee has jurisdiction to disallow the claim on the trustee's objections that the creditor had received a voidable preference, is

it reversible error for the Referee to refuse to abate or postpone the hearing and adjudication of the objections under 28 USCA Sec. 2105, which provides: "There shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

STATUTES INVOLVED

The Bankruptcy Act (11 USCA) provides in pertinent part:

Sec. 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . .

(2) Allow claims, disallow claims, reconsider allowlowed or disallowed claims, and allow or disallow them against bankrupt estates; . . . (11 USCA 11)

Sec. 23. Jurisdiction of United States and State Courts . . .

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if pro-

ceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sec. 60, 67 and 70 of this Act. (11 USCA 46)

Sec. 47. The Duties of Trustees. a. Trustees shall . . . (8) examine all proofs of claim and object to the allowance of such claims as may be improper; . . . (11 USCA 75)

Sec. 57. Proof and Allowance of Claims . . .

d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion . . .

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received or acquired preferences, . . . void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, . . . (11 USCA 93)

Sec. 60b . . . For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

(11 USCA 96)

Sec. 2105 of the Judicial Code (28 USCA) provides:

There shall be no reversal in the Supreme Court or a Court of Appeals for error in rulings upon matters in abatement which do not involve jurisdiction.

STATEMENT

On February 18, 1950, Alaga Tractor Company, a farm machinery dealer, was adjudicated a voluntary bankrupt. (R-3) On February 10,1950, B. F. Avery & Sons Company, a farm machinery manufacturer, had repossessed from the bankrupt machinery which it had bought from Avery Company under a "Dealer's Contract" (R-25). On May 18, 1950, Avery Company filed with the Referee its proof of unsecured claim against the bankrupt estate for a balance due under the contract. (R-8-11)

J. Alvan Davis, the trustee, filed objections to the allowance of the claim on the ground that the reposses sion of the machinery was a voidable preference (R-11). Before filing these objections, but after Avery Company had filed its proof of claim with the Referee, the trustee had commenced a plenary suit against Avery Company in the District Court to recover the repossessed property, alleging that the repossession was not only a voidable preference under Sec. 60 of the Bankruptcy Act, but also was voidable under Sec. 67 and 70 of the Act. (R-144)

To the objections of the trustee to the allowance of

its claim, Avery Company filed a response with the Referee admitting repossession of the property but denying that the repossession was a voidable preference. Avery Company further contended that the Referee had no jurisdiction to adjudicate the question concerning the preference because of its adverse possession of the property at the time of bankruptcy, and also contended that the trustee's plenary suit abated a hearing and determination of the objections. (R-18) The Referee, however, determined that he did have jurisdiction, refused to abate the hearing and found that the repossession of the property by Avery Company constituted a voidable preference, and that its proof of claim should be disallowed unless the preference were surrendered within thirty days. (R-30) On review the District Court affirmed the Referee (R-120), but on appeal the Court of Appeals entered a judgment of reversal, holding that the Referee did not have summary jurisdiction, by way of determining the trustee's objections to the proof of debt, to adjudge the transfers voidable preferences, and directed the entry of a judgment "affirming the Referee in refusing presently to allow the claim of Avery Company until the preferences asserted against the claimant are properly adjudicated . . ." (R-149)

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that under Sec. 2a(2) and 57g of the Bankruptcy Act the Referee in determining objec-

tions to the proof of claim filed by Avery Company did not have jurisdiction to adjudicate the voidable character of the preferential transfers which constituted the trustee's grounds of objection to the claim, and to disallow the claim unless the preferences were surrendered within thirty days.

3. In holding that since Avery Company at the time of bankruptcy was in adverse possession of the preferentially transferred property under a claim of right, the question concerning the preference would have to be adjudicated in a plenary suit, and that the Referee should not have passed upon the objections to the allowance of the claim, but should have abated or postponed the hearing until the question concerning the preference could be settled in a plenary suit.

4. In holding in effect that Avery Company in voluntarily filing its proof of claim with the Referee did not thereby consent to the summary jurisdiction of the Referee to determine and adjudicate valid defenses and objections made by the trustee to the allowance of the claim, including an adjudication of the unlawful character of the transfers.

5. In reversing the District Court despite the provisions of 28 USCA 2105 which provide: "There shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

REASONS FOR GRANTING THE WRIT

A. The decision of the Fifth Circuit in the case at

bar is in direct conflict with a decision of the Second Circuit in the case of In re Carl Dernburg & Son, Inc., 5 F2d 37, and with a decision of the Eighth Circuit in the case of Atwood-Larsen Co. v. Hasvold, et al, 280 F 380, and is possibly in conflict with applicable Supreme Court decisions in the cases of Bronx Brass Foundry Inc. v. Irving Trust Company, 297 US 230, Wiswall v. Campbell, 93 US 923, and Alexander v. Hillman, 296 US 222.

B. The questions presented are of general importance and are frequently arising in the administration of bankrupt estates. The situation which produced the case at bar is not unusual or exceptional. The decision by the Fifth Circuit will cause great confusion with respect to the summary jurisdiction of the bankruptcy court to adjudicate the allowability of a claim against a bankrupt estate in favor of a creditor who has received a voidable preference.

SUPPORTING BRIEF

This case does not involve the summary jurisdiction of the Referee peremptorily to bring into court by a show-cause order a third party in adverse possession of property and to adjudicate rights with respect to such property. This case involves the summary jurisdiction of the Referee under Sec. 2a and 57g of the Bankruptcy Act over a creditor who has voluntarily come into court by filing a proof of claim, the allowance of which has been objected to by the trustee on the ground that the creditor had received avoidable preference. An irrecon-

cilable conflict of authority now exists as a result of the decision by the Fifth Circuit.

Fifth Circuit Holding

Clearly to point out this conflict, we quote the following excerpts from the Fifth Circuit opinion to be contrasted with holdings from other Circuits:

> "The question of the jurisdiction of the Referee summarily, by way of determining the trustee's objections to Avery Company's proof of an unrelated debt, to adjudge that the transfer was void, we must meet at the outset." (R-148)

The Court held:

> "We think the trustee, believing that a preference existed, properly objected to the proof of Avery Company's claim of a debt due for other property. The Referee properly, over Avery Company's objections, inquired preliminarily whether there was a preference, but finding that Avery Company was in adverse possession prior to bankruptcy under a claim of right not merely colorable or put forth in bad faith, he should not summarily have adjudicated its merits, but should have left the claim pending before him, and directed the trustee to prosecute his plenary suit to establish and recover the preference." (R-150)

Second Circuit Holding

Now the Second Circuit has held directly to the contrary in re Carl Dernburg & Son, Inc. 5 F2d 37:

> "The Referee in Bankruptcy has full authority to inquire into defenses of claims which are based upon preferences or transfers (p. 38) . . .

where the claimant has submitted her claim to the jurisdiction of the Bankruptcy Court, as here, by presenting her proof of debt of $15,000, she must be deemed to have consented to the jurisdiction of the court to decide any defenses that may be lawfully interposed." (p. 39)

"The statutes specifically create a defense, making a claim void or voidable where it appears that a transfer was made which granted the preference." (p. 39)

And further —

"Every person submitting himself to the Bankruptcy Court in the progress of the case for the purpose of having his rights in the estate determined, makes himself a party to the suit and bound in the legitimate course of the proceeding. As was said in Wiswal, et al. v. Campbell, 93 US 347: 'A creditor who offers proof of his claim and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences.' "

The trustee in the Dernburg case objected to the allowance of a proof of claim on the ground that the creditor had received a preferential payment of $3777.00 in cash, notes, etc. The creditor, who of course was in adverse possession, specifically challenged the Referee's summary jurisdiction to determine the trustee's objections, contending that the question could be determined only in a plenary suit. The Referee's summary jurisdiction was upheld. This decision has been cited approvingly in the following cases: In re Barnett (CA2d) 12 F2d 73-81; Schwartz v. Levine & Malin, Inc. (CA2d) 111 F2d 81; Floro Realty & Investment Co. v. Steem Electric

Corp. (CA8th) 128 F2d 338; Metz v. Knobel (CA2nd) 21 F2d 317-18. In this last cited case the order entered by the Referee was similar in form to that used in the case at bar.

Eighth Circuit Holding

In the case of Atwood-Larsen Co. v. Hasvold, et al. (CA8th) 280 F 385, certain creditors of a bankrupt estate objected to the allowance of a claim of another creditor on the ground that the claimant had received a preferential payment of money. The Referee refused to hear evidence in support of the objections. On appeal, the Eighth Circuit said:

> "Errors specified and argued here are all to the effect that the objections to the allowance of the claim presented a controversy that should be determined only in a plenary suit . . . It was clearly the duty of the Referee to hear evidence on the objections, Bankruptcy Act 57 (d), (f), (g) . . . There can be no doubt that the Referee was in error . . ."

Supreme Court Decisions

In Bronx Brass Factory, Inc. v. Irving Trust Company (CA2nd) 76 F2d 935, a creditor had received a preferential payment of $1,000 on account within four months of bankruptcy and later, after bankruptcy, filed its proof of claim for an unpaid balance. The trustee objected to the allowance of the claim on the ground of the preferential payment. The creditor then sought to withdraw its proof of claim, but the Referee refused to allow the withdrawal and determined that the pay-

ment constituted a voidable preference, and that the claim should be disallowed unless the preference should be surrendered within twenty days. The Second Circuit held:

> "If leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with its motion to expunge, the question whether the creditor had acquired a preference . . . To have deprived the trustee of the right to establish in the summary proceeding the fact of a preference would have been to take away a substantial right . . . we do not think it necessary or desirable to allow the process of the court to be trifled with by creditors whose rights have to be disposed of, if there is to be convenient and speedy administration of the estates of bankrupts."

The Supreme Court granted certiorari and then entered a judgment of affirmance, Bronx Brass Foundry, Inc. v. Irving Trust Company, 297 US 230, saying of the Court of Appeals decision: "We agree with the reasoning and the conclusion reached." With seeming approval this Court quoted the order of the Referee which in part said:

> "Where a creditor files a claim against the bankrupt estate, he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive between the parties."

In Alexander v. Hillman, 296 US 222, the question arose as to the effect of a creditor's filing his claim in an equitable receivership. The court said:

"Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleadings or commencement of suit. Unquestionably, they submit themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers, and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims."

The Fourth Circuit in Columbia Foundry Co. v. Lochner, 179 F2d 630, specifically applied the holding in Alexander v. Hillman, supra, to bankruptcy proceedings, saying:

"One who files a proof of claim should be held to acquiesce in the adjudication of any proper set off or counterclaim even to the extent of a judgment thereon . . ."

Likewise, the Second Circuit in Chase National Bank v. Lyford, 147 F2d 273, applied the holding in Alexander v. Hillman, supra, to a bankruptcy proceeding to sustain the Referee's summary jurisdiction to a bank's right of set off.

In an earlier case, Wiswall v. Campbell, 93 US 923, this Court emphasized that a speedy distribution of a bankrupt's assets was of foremost importance and held:

"A creditor who offers proof of his claim and demands its allowance subjects himself to the dominion of the court and must abide the consequences. His remedies for the purpose of this proof are prescribed by law."

The decisions here cited, it will be observed, are

in sharp conflict with the holding of the Fifth Circuit. On the one hand the Referee's summary jurisdiction is upheld, and on the other denied. The resulting confusion should be eliminated. Petitioner submits that a correct construction of Sec. 2a(2) and Sec. 57g of the Bankruptcy Act authorizes and requires the Referee in a summary manner to hear and determine objections interposed to the allowance of creditors' proofs of claim, including objections that creditors had received voidable preferences. Whether the Referee in sustaining an objection that a creditor had received a voidable preference may go further and command the delivery of the preference to the trustee is not involved in the case at bar. The Referee did not direct a surrender of the preference, but limited his order to a disallowance of the claim unless the preference should be surrendered. This is the practice followed in most of the cited cases.

The general importance of the question in this case may be judged by the frequency with which appelate courts have been called upon to deal with it. As another example that the identical problem remains current, we call attention to a recent District Court case, In re Nathan (DC Cal) 98 F Supp 686, reported September 17, 1951, which after reviewing many appelate court decisions, upheld the summary jurisdiction of the Referee.

We have found no authority in any appellate circuits in agreement with the decision in the case at bar. The Eighth Circuit in one case, Triangle Electric Co. v. Foutch, 40 F2d 353, expressed some views in keeping with those of the Fifth Circuit, but in a later case,

Floro Realty & Investment Co. v. Steem Electric Corp., supra, a holding entirely to the contrary was made. Even the Fifth Circuit in Ullman, Stern & Krause v. Coppard, 246 F 124, has recognized the Referee's jurisdiction to sustain a trustee's objection to a proof of claim offered by a creditor who had received a preference, the court holding in a subsequent suit by the trustee to recover the preference that the order of the Referee was res judicata. Clearly the Referee must have had jurisdiction, if his order could in a subsequent suit be sustained as an adjudication of the preference.

The court below in its opinion cited for authority Cline v. Kaplan, 323 US 97, Louisville Trust Company v. Comingor, 184 US 18, and Chandler v. Perry, 74 F2d 371. We submit most respectfully that the cited cases are not in point, but are clearly distinguishable. Each of these cases involved a turn-over proceeding originated by the trustee against a third person not before the court, and in each case the trustee was seeking to recover property adversely held. In none of the cases did the party proceeded against come voluntarily into court, but only in obedience to a peremptory order. The cases did not involve the construction of Sec. 2a(2) and Sec. 57g of the Bankruptcy Act, nor the jurisdiction of the Referee to adjudicate objections to the allowance of a creditor's proof of claim voluntarily filed. The situation in the case at bar is very different. The cited cases would have been applicable only if Avery Company had not voluntarily filed its proof of claim.

NO GROUND FOR ABATEMENT

If the Referee does have jurisdiction under the circumstances of this case, then the reversal by the Fifth Circuit of the District Court was in direct conflict with 28 USCA 2105, which prescribes that there shall be no reversal by an appellate court in rulings upon matters in abatement not involving jurisdiction. It is true that the trustee filed a plenary suit to recover the preference, but this suit in no wise restricted the jurisdiction of the Referee to determine objections to the proof of claim which Avery Company had voluntarily filed. The commencement of the plenary suit and the objection to the allowance of the claim were entirely consistent. It was not a matter of electing remedies, but even if the two proceedings were inconsistent, the refusal of the Referee to abate the hearing could not have been reversed under the cited code provision. The reversal actually was based upon the ground that the Referee had no jurisdiction – and that is the question.

CONCLUSION

Only this Court can resolve the conflict created by the Fifth Circuit decision with decisions of the Second and Eighth Circuits. The question of jurisdiction is very practical, real and important

We, therefore, respectfully submit that this petition for a writ of certiorari should be granted.

J. MADDEN HATCHER,
THEO J. McGEE,
Attorneys for J. Alvan Davis, Trustee in Bankruptcy of the Estate of Alaga Tractor Company, Bankrupt.

Address of Counsel
Columbus, Georgia

FEB 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 537

J. ALVAN DAVIS, TRUSTEE,
Petitioner,

versus

B. F. AVERY & SONS COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT.

FARKAS, LANDAU & DAVIS,
By LEONARD FARKAS,
Attorneys for B. F. Avery & Sons, Company.

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SUPREME COURT OF THE UNITED STATES

October Term, 1951.

No. .....

J. ALVAN DAVIS, TRUSTEE,
Petitioner,

versus

B. F. AVERY & SONS COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

1. The facts show that B. F. AVERY & SONS COMPANY was in possession of the property in dispute prior to bankruptcy in good faith claiming ownership to said property.

2. The question is the jurisdiction of the referee summarily over the objections of claimant, by way of determining the trustee's objection to B. F. AVERY & SONS COMPANY'S proof of an independent and unrelated debt, to adjudge that the transfer to B. F. AVERY & SONS COMPANY was void.

ARGUMENT AND CITATION OF AUTHORITIES.

I.

The findings of fact show conclusively that the Respondent was in possession of the property in question prior to bankruptcy, having repossessed the same from the bankrupt.

Where property has been repossessed prior to the filing of the petition in bankruptcy and he holds same under a *bona fide* claim, the bankrupt court has no jurisdiction to determine the title to the property but same can only be done by the trustee filing a plenary suit in the district court.

In *Remington on Bankruptcy*, Vol. 5, pages 502 and 503, the Author said:

> "If the possession, actual or constructive, of the property is in the bankrupt, or in his agent, or in someone not claiming a beneficial interest in it, or is in the receiver, marshal or trustee, in bankruptcy, the bankruptcy court has summary jurisdiction over it by orders made in the bankruptcy proceedings

themselves, and may summarily order its surrender or delivery; may bring all parties claiming interest in it into court; may determine all rights to it; if, on the other hand, some third party claiming some beneficial interest in the property has possession (except in certain instances where court officers are in possession), or if the property is a mere debt owed by the third party, then such third party need not come into the bankruptcy proceedings for his rights, and the trustee cannot bring him into the proceedings, and he is entitled to be heard in plenary action."

In *Chandler v. Perry,* 5th C. C. A., 74 F. (2d) 371, on page 372, the Court said:

"A distinction must be observed between proceedings to obtain possession of the property belonging to the estate and those whose object is to deal with the property of the estate already in possession of the Court through its officers. As to the former, it is well settled that summary process may be used to obtain possession of all property of the bankrupt which was in the bankrupt's possession at the time the petition was filed or which was then held by others for him or by others under a merely pretended or colorable claim, or to recover possession of property which has been in the court's possession and has been wrongfully taken away. On the other hand, to recover property adversely held by a third person at the time the petition was filed, though under a title which is asserted to be fraudulent or otherwise void, or to recover a debt or other chose of action of which the court could not have actual possession, a plenary suit with the formality and delay incident to such whether at law or in equity must be resorted to. In all pro-

ceedings to recover the possession of property summarily there is preliminary jurisdiction to inquiry into the nature of the defendant's possession and into any adverse claim so far as to see whether it is more than colorable." (Numerous cases from Supreme Court cited in support of this view.)

In *Fisher v. Young*, 168 F. (2d) 803, on page 807, the Court said:

> "In Cline v. Kaplan, 323 U. S. 97, 65 S. Ct. 155, 156, 89 L. Ed. 97, the Court said:
>
> " 'A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 481, 60 S. Ct. 628, 84 L. Ed. 876. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated "in suits of the ordinary character, with the rights and remedies incident thereto.' * * *It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial.* Louisville Trustee Co. v. Comingor, 184 U. S. 18, 25, 26, 22 S. Ct. 293, 46 L. Ed. 413. *Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court.* MacDonald v. Plymouth County Trust Company,

286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093.' " (Italics ours.)

It is our contention that the moment the referee found that Avery was a *bona fide* claimant his jurisdiction ended and the claimant was entitled to have the merits of his claim passed upon in a plenary suit.

The effect of the Referee's ruling is to do indirectly what the law prohibits to be done directly. Such evasions of the law are not permissible and especially is this true when the Referee attempts to substitute a summary proceeding for a plenary suit. In the instant case, there was no particular need or reason for the Referee to proceed with the trial of the issues presented to him as the Trustee had, on his own volition, filed a plenary suit raising identically the same questions.

There is a maxim of the law that answers this question: *"Quando aliquid prohibetur ex directo, prohibitur et per obliquum"*. This principle is especially applicable in the instant case where the findings of the Referee that a preference was created is *res adjudicata* and binding on the judge in the district court. If such practice is permitted, it simply means that the referee is prohibited from directly determining title to property *bona fide* held, yet he may determine identically the same issue and same question indirectly. We do not believe the law permits such manipulation of fundamental principles.

II.

The referee did not have jurisdiction to determine the title to the property repossessed in a summary proceeding. The bankrupt court is a court of equity and deals with substance and not form. The referee's ruling, unless reversed, is *res adjudicata* between appellant and appellee in the plenary suit pending in the District Court. Therefore, it is in effect a final determination of title. *Sampsell v. Imperial Paper & Color Corp.*, 1941, 313 U. S. 215, 218-219, 61 S. Ct. 904, 85 L. Ed. 1293; *Chicot Co. Drainage Dist. v. Baxter State Bank*, 1940, 308 U. S. 371, 376-78, 60 S. Ct. 317, 84 L. Ed. 329; *Lesser v. Gray*, 1914, 236 U. S. 70, 73-75, 35 S. Ct. 227, 59 L. Ed. 471; *Griffin v. Vought, supra*, 175 F. 2d. at pages 189-190; *Johnson v. Wilson*, 9 Cir., 1941, 118 F. 2d 557, 560; *In re Florsheim, supra*, 24 F. Supp. at page 992.

The ruling of the referee is equivalent to adjudicating a counterclaim and rendering an affirmative judgment, and, therefore, the law applicable to such cases is controlling. In order for the referee to have jurisdiction to adjudicate a counterclaim arising out of the same transaction, the counterclaim must be an equitable claim and not a legal one. *American Mills Co. v. American Surety Co.*, 1922, 260 U. S. 360, 364, 43 S. Ct. 149, 151, 68 L. Ed. 306; *Texas Co. v. Borne Scrymser Co.*, 4 Cir. 1933, 68 F. 2d. 104, 106; *Cooling Tower Co. v. C. F. Braun & Co.*, 9 Cir. 1924, 1 F. 2d. 178, 179; *Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co.*, D. C. N. D. Ohio 1917, 243 F. 405, 407.

It may be assumed for the sake or argument, that the respondent submitted itself to the bankrupt court's jurisdiction in respect to all objections that might be interposed to the validity, amount, or priority of its claim, although such is not the case here presented. The trustee does not question the validity or the amount of the claim filed by appellant. He simply sets up an independent and separate transaction contending that respondent had received a preference by repossessing certain property sold by appellant to the bankrupt. It is obvious that the counterclaim is not defensive and is an independent transaction and is a legal and not an equitable claim. All authorities agree that unless there is a consent to try a counterclaim, in order for the referee to adjudicate a counterclaim and render an affirmative judgment, the creditor must consent to the jurisdiction and in the absence of consent, the bankrupt court does not have jurisdiction summarily to adjudicate an action by the trustee to recover property adversely held. Bankruptcy Act §23, sub. b., 11 U. S. C. A. §46, sub. b; *Cline v. Kaplan,* 1944, 323 U. S. 97, 99, 65 S. Ct. 155, 89 L. Ed. 97; *Harrison v. Chamberlain* 1926, 271 U. S. 191, 193, 46 S. Ct. 467, 70 L. Ed. 897, but the trustee must resort to plenary action. *Weidhorn v. Levy,* 1920, 253 U. S. 268, 272, 40 S. Ct. 534, 64 L. Ed. 898.

It has been held that the filing of a claim in bankruptcy does not constitute consent. *Daniel v. Guaranty Trust Co.,* 1932, 285 U. S. 154, 162-164, 54 S. Ct. 326, 76 L. Ed. 675; *Pickens v. Roy,* 1902, 187 U. S. 177, 180, 23 S. Ct. 78, 47 L. Ed. 128; *Thalhimer, Inc. v. Florence,* 4 Cir. 1932, 58 F. 2d, 23, 26; *Metz v. Knobel,* 2 Cir., 1927, 21 F. 2d. 317,

318; cf. *In re Eakin* 2 Cir. 1946, 154 F 2d 717, 719; *Fitch v. Richardson,* 1 Cir., 1906, 147 F. 197, 198.

The counterclaim in the instant case being one at law, respondent could not be deprived of its right of a trial by jury. See *Liberty Oil Co. v. Condon Nat. Bank,* 1922, 260 U. S. 235, 242-243, 43 S. Ct. 118, 67 L. Ed. 232; *American Mills Co. v. American Surety Co., supra,* 260 U. S. at page 365, 43 S. Ct. 149, 67 L. Ed. 306.

The counterclaim at bar is a legal one and trial by jury is secure to it by the 7th Amendment of the Constitution. *American Mills Co. v. American Surety Co., supra,* 260 U. S. at page 264-265, 43 S. Ct. 149, 151, 67 L. Ed. 306.

It may me contended that respondent by filing its claim submitted to the jurisdiction of the bankrupt court, not only as to the claim filed but to any countersuit that the bankrupt may have against respondent whether growing out of same transaction or whether it be a claim arising in law or equity. To adopt such a rule would deprive a creditor of every right he is entitled to under the Constitution and the Laws of the United States, in that he would be forced to litigate independent, separate and distinct cause of action in a foreign jurisdiction, and he would be deprived of his rights of trial by jury. The respondent had a choice either to abandon its claim or file it in the bankrupt court because unless it did file its claim in the bankrupt court it could not seek relief in any other court. Certainly, it being compulsory for the respondent to set forth its claim in the only tribunal provided by law, this can not be construed as a waiver of its constitutional

rights. In the instant case, there can be no implied consent to the jurisdiction of the bankrupt court from the silence of the respondent because the respondent objected to the bankrupt court's jurisdiction.

The respondent by filing its claims in the bankrupt court did not waive its right with respect to independent claims against it which the trustee may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306; *Sinclair Refining Co. v. Midland Oil Co.* (C. C. A. 4th) 55 F. 2d 42, 47.

III.

Petitioner has cited cases not applicable to the issues involved but two of the cases cited may be briefly discussed.

In re Carl Dernburg & Son, 5 F. 2d. 37 there are not sufficient facts stated in the opinion to determine definitely what was the procedure followed but it is sufficient to say that the court based its decision on whatever the facts may have been that the claimant having submitted her claim to the jurisdiction of the bankrupt court, she must be deemed to have consented to the jurisdiction of the court to decide *any defense that may be lawfully interposed.*

In *Columbia Foundry Company v. Lochner,* 179 F. 2d 630, this case involved a defense to the claim filed on the ground that the merchandise was defective. It is clear that this was not a separate and independent counterclaim and in addition to this, the court held that claimant having filed his claim consented to the jurisdiction of the court to try the counterclaim.

In the instant case, at the very outset and in every stage of the proceeding, respondent objected to the jurisdiction of the referee in determining the independent and unrelated suit in a summary proceeding. The Supreme Court as well as various Circuit Courts have repeatedly held that a filing of a claim does not constitute consent to try an independent counterclaim in a summary proceeding. See cases cited *supra,* especially the case of *Cline v. Kaplan,* 323 U. S. 97, 89 L. Ed. 97, where the question as to what amounted to consent in a summary proceeding was examined.

IV.

The question of abatement is not involved in the instant case but it is one of jurisdiction.

CONCLUSION.

We respectfully insist that the decision in this case is a sound one and does not conflict with the decisions of the 2nd and 8th Circuits.

We respectfully request that the petition for certiorari be denied.

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